

Business Law Newsletter

January 2011

How to Fill Jobs with Skilled Immigrant Labor When a Shortage Exists

By Robert M. Suarez

A Pleasanton, California couple is the latest family-owned business to come under the federal radar for hiring undocumented workers. Heavy fines and embarrassment could have been avoided if proper precautions were taken.

More and more business owners are being arraigned in federal court on tax and immigration violations. These charges are generally the result of lengthy investigations by the U.S. Immigration and Customs Enforcement (ICE), Office of Homeland Security Investigations (HSI), Internal Revenue Service's Criminal Investigations unit, and the Social Security Administration's Office of Inspector General.

The enactment of Arizona's immigration law in early 2010 affected all the states, not just Arizona. Federal agencies throughout the United States have been investigating employers to determine harboring of illegal aliens for financial gain, false representation of Social Security numbers, tax evasion, filing false tax returns, etc – much of which is unknown to the employer. If charged, defendants can face up to and in excess of a \$100,000 bond. To avoid the preceding unwanted expenses and investigations, employers should file the proper work visas with the Department of Labor and the U.S. Citizenship and Immigration Services (USCIS).

Employers can sometimes use alien labor when there is a shortage of available U.S. workers to fill certain jobs. Under certain conditions, U.S. immigration law may allow a U.S. employer to file

a Form I-129 which is a Petition for Non Immigrant Workers. The preceding is to be filed with the USCIS on behalf of a prospective national foreigner employee. Upon approval of the petition, the prospective employee may apply for admission to the U.S. or for a change of non-immigrant status while in the U.S., to temporarily work or to receive training.

To begin the process, the employer must file a Form I-129 with the USCIS. Additionally, the employer must go to the Department of Labor (DOL) and complete an Application for Alien Employment Certification. By logging on to <http://icert.doleta.gov/>, the employer can create an account and provide his/her attorney with access to assist in the petition process. The Web site also provides a wealth of information pertaining to prevailing wage determinations.

Several visas are available and each require specific elements for eligibility, such as:

- H1B for professionals and/or specialty occupations;
- H2B for temporary workers performing other services for labor skilled or unskilled;
- H3 for trainees or special education exchange visitors;
- L-1A for intracompany transferee for executives or managers if the Michigan owners also have businesses in other countries;

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- L-1B for intracompany transferees for employees with specialized knowledge;
- O1 for foreign nationals who have extraordinary ability in sciences, arts, education, business, or athletics; and
- Q-visa for an international cultural exchange program.

Certification of the visas indicated above must first be received from the DOL before submitting the I-129 petition to the USCIS. For example, for an H1B, a Labor Condition Application (LCA) is required; whereas an H2B must be accompanied by an Application for Alien Employment Certification.

The O-1 category is available to foreign nationals who have extraordinary ability in science, art, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation. Extraordinary ability is a high level of expertise and indicates that the person is one of a small percentage who has risen to the very top of the field. The foreign national must seek to enter the United States to continue work in the area in which he or she is extraordinary. To file an I-129 petition for an O-1 visa, there must be an offer of employment, along with supporting evidence of extraordinary ability; the petition must be filed up to six months before the intended start date, and the employer is responsible for the return cost of transportation if the foreign national is dismissed before the petition period expires.

The O-1 petition and approval process takes approximately four months. If needed, the USCIS offers an option for expediting O-1 petitions called “premium processing.” There is a special fee for this service in addition to the normal USCIS filing fee. H visas take longer and are subject to caps. For example, H-1B visas are capped at 65,000 during a fiscal year; an additional 20,000 are available to those individuals who received a master’s degree or higher from a U.S. institution of higher education.

H1B visas are reserved for “specialty occupations.” The petitioner seeking an H1B must establish that

the job requires the services of a professional, that the foreign worker qualifies as such a professional, and that a LCA has been certified by the Department of Labor. Generally, the H1B visa is available for those workers who have a bachelor’s degree in a technical field who will be working in a technical position that requires an undergraduate degree.

To protect the salaries of foreign nationals, employers are required to pay the higher of either the actual or prevailing wage. The actual wage is the wage paid to other co-workers in similar positions; the prevailing wage is the average salary paid to workers in the area of intended employment. The prevailing wage is often obtained through a request to the employment economic agency in the employer’s state.

In addition to promising to pay the higher of the prevailing or actual wage, the employer promises that hiring an H1B worker will not adversely affect other co-workers.

As part of the H1B application process, the employer must make certain promises. In addition to promising to pay the higher of the prevailing or actual wage, the employer promises that hiring an H1B worker will not adversely affect other co-workers. Furthermore, the employer attests that it will take certain action in the event of a strike or lockout and that it has provided adequate notice to other workers about its hiring a foreign national. An H1B classification may be granted to an alien who:

- (1) will perform services in a specialty occupation which requires theoretical and practical application of a body of highly specialized knowledge and attainment of a baccalaureate or higher degree or its equivalent as a minimum requirement for entry into the occupation in the United States, and who is qualified to perform services in the specialty occupation because he or she has attained a baccalaureate or higher degree or its equivalent in the specialty occupation.
- (2) will perform services of an exceptional nature requiring exceptional merit and ability relating to a Department of Defense (DOD) cooperative research and development project or a coproduction project provided for under a

Government-to-Government agreement administered by the Secretary of Defense; or

(3) will perform services in the field of fashion modeling and who is of distinguished merit and ability.

The final step of the H1B petition process involves submitting the package to the USCIC, which normally takes about six months to process, review, and adjudicate. Since there are a limited number H1Bs available each year, timing is important, and the foreign national should be sure to apply for an H-1B early enough so that his petition will not become subject to the cap. If a petition does not make it within the annual allotment, he will have to wait until October 1, to resume processing for the following fiscal year.

The cost to complete Employment-Based Visas ranges from \$4,000-\$6,500, depending on the complexity. Legal fees, filing fees, and costs associated with the above referenced petitions vary depending on the circumstances. But H-visas are the least expensive. Fees also do not include Department of State visa fees and biometric fees. At the more expensive end of the visa spectrum are the O and Q visas, which require lengthy briefs along with relevant exhibits that prove the requirements needed to support the petitions.

Smith Haughey's immigration attorneys are ready to discuss immigration concerns and identify the proper visa for each employer and/or individual. Rob can be reached directly at 616-458-4256 or rsuarez@shrr.com.

Keeping Contracts Out of the Tort World

By Veronique Liem, Attorney, Mediator & Arbitrator

One important reason agreements should be in writing and prepared with the assistance of legal counsel is to ensure that, later, if things go wrong, claims of fraudulent or negligent misrepresentation will not surface. Why? Because that type of claim is a tort claim and once raised, damage claims are no longer limited to the contract terms and their breach. Instead, damages then balloon into tort remedies that can reach far beyond the scope of the contract.

A typical means by which contractual disputes may expand into tort disputes are through claims of fraud, misrepresentations, or fraudulent inducement in contracting. Fraud claims are typically based upon material and false representations made negligently or with knowledge of their falsity. They must be relied upon, perhaps by executing a contract, and must result in damages.

Fraud in the inducement presents a special situation when a contract is signed and the ability to freely

and fairly negotiate a contract was undermined by the other party's fraudulent or negligent assertions. The assertions must be material and extraneous to the subject matter of the contract and relate to past or existing facts. For example, the assertion may relate to a party's financial situation or its access to key markets. Promises as to the future or statements of intention are not typically actionable in fraud.

A typical means by which contractual disputes may expand into tort disputes are through claims of fraud, misrepresentations, or fraudulent inducement in

If the fraud or representations are extraneous to the contract, the party who reasonably relied on them may be entitled to tort remedies, in addition to breach of contract remedies. This can greatly expand a damage claim. For example, if a manufacturer successfully argues that it was tricked into contracting with a distributor, perhaps through a misrepresented balance sheet, the manufacturer can now seek damages beyond the consequences caused by the failed contract. The manufacturer will not only attempt to recoup all sales lost as a result of the failed distributorship contract, but also seek compensation for its lost profit opportunities from

other ventures. The damages will no longer be limited to those flowing from the breach of contract between the manufacturer and the distributor, but will expand into the world of tort and its lost opportunities.

It is therefore important to not induce a party into contracting through overly optimistic or misrepresented assertions. It is also why contracts should be in writing and written with assistance of counsel. If the contract is clear and comprehensive, if it includes an integration clause to preclude extraneous assertions, fraud or misrepresentation

claims will be far more difficult to raise should the venture fail. The alleged fraud or misrepresentation will be interwoven with the breach of contract and only resolvable as part of a breach of contract claim. Better, the contract will have made clear that all material representations are written in the contract and claims that other representations were made will be futile. The contract terms will hopefully be clear and comprehensive, making extraneous assertions difficult.

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The Michigan Court of Appeals Extends the *De Facto* Corporation Doctrine to Michigan Limited Liability Companies

By Steven K. Stawski, Attorney

Can a person enter into a valid contract for a limited liability that does not yet exist? The Michigan Court of Appeals recently addressed this question by extending limited liability protection to the organizer of a limited liability company who signed a contract worth \$96,367.

Generally speaking, a person who is a manager or member of a limited liability company is not liable for the acts, debts, or obligations of the limited liability company. Courts treat limited liability companies as business entities that are separate and distinct from its members and managers.

The existence of a Limited Liability Company begins on the effective date of the Articles of Organization, which must be delivered to the administrator of the Michigan Department of Consumer and Industry Services (DCIS).

In a recent case, a businessman signed an excavation contract on behalf of a proposed new business entity, Outlaw Excavating, before the Articles of Organization for the limited liability company were delivered to the DCIS. Because the entity was not formed prior to the execution of the

contact, the trial court found the businessman personally liable for breach of contract and awarded damages for \$96,367.

In reversing the trial court, the Michigan Court of Appeals extended the *de facto* corporation doctrine to a limited liability company to shield the organizer from individual liability. The *de facto* corporation doctrine was previously limited to actions involving corporations under the Michigan Business Corporation Act. It allows a defectively-formed association to attain the legal status of a corporation.

Parties to an agreement can avoid disputes, and reduce the risk of claims for individual liability for breach of contract, by completing the proper business entity formation requirements

prior to entering contractual agreements.

For more assurance, contracting parties who seek to enforce their agreements against natural persons should obtain signatures of those persons in their individual capacities or obtain a personal guaranty.

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New Business Law Attorneys Join All Three SHRR Offices

Smith Haughey is proud to announce the addition of three new business law attorneys to the firm: Veronique Liem, Robert Suarez, and Lindsay Weber.

Veronique Liem



Veronique is a well-regarded attorney and trial lawyer with 20 years of experience representing individuals, professionals, families, and businesses in Ann Arbor. Her practice includes family law and divorce, business and employment litigation, alternative dispute resolution, and appeals. She has successfully litigated, tried, or settled dozens of cases in the Detroit tri-county area, and Washtenaw County, as well as in Federal Court. Veronique is a trained, court-approved mediator for business, employment, and family law disputes, an arbitrator for the Financial Industry Regulation Authority, and a certified collaborative divorce attorney. Notably, she was cited by the Ann Arbor Observer as a “respected local divorce lawyer.”

Veronique is very active in the legal community and has served in leadership positions for numerous industry and non-profit organizations in Washtenaw County and the state of Michigan, including a stint as board president of the Washtenaw County Bar Association. Veronique earned both her MBA and Juris Doctor from the University of Michigan.

Veronique works in the firm’s Ann Arbor office and can be reached directly at 734-913-5517 or vliem@shrr.com.

Robert Suarez



Rob counsels individuals and businesses in an array of legal issues. Rob is fluent in multiple languages including Spanish, Russian, and French, and is conversational in Arabic. He often uses his language skills when counseling clients on issues relating to immigration law, business and employment law, and estate planning. Rob also enjoys representing

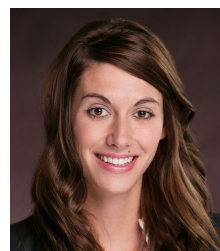
veterans in proceedings before the Board of Veterans Appeals in matters involving veterans’ benefits claims.

Rob is a combat veteran and served in both the United States Marine Corps and Army before being honorably discharged from active duty. He served in Operation Iraqi Freedom where he trained Iraqi police officers, investigated civil and criminal complaints of embezzlement and corruption, arrested suspected insurgents, and conducted internal investigations. Notably, Rob received a letter of reference from General Petraeus, and earned the Combat Action Badge and the Bronze Star.

In addition to his military service, Rob has also worked for the North Carolina State Bureau of Investigations and the New York City Department of Health, Bureau of Environmental Investigations. Rob received his Juris Doctorate from Thomas M. Cooley School of Law, a Bachelor of Science from Long Island University, and became a sworn law enforcement officer after attending the North Carolina SBI Academy.

Rob works in the firm’s Grand Rapids office and can be reached directly at 616-458-4256 or rsuarez@shrr.com.

Lindsay Weber



Lindsay represents families and individuals in an array of legal issues. She counsels businesses and assists them with real property matters, zoning and land use issues, commercial transactions, and municipal law. Through her family law practice, Lindsay assists her clients with divorces, child custody and support, parenting time, grandparents’ rights, spousal support, and prenuptial and postnuptial agreements. Her family law practice also extends to the

specialized area of adoption law, for which she has completed training programs focusing on the intricacies of the different issues related to adoption. In addition, Lindsay uses her estate-planning experience to help her clients plan for the future and effectively navigate the probate process.

Lindsay is a member of the State Bar of Michigan, American Bar Association, Traverse City Young Professionals, and the Grand Traverse-Leelanau-Antrim Bar Association, where she serves as co-chair of the continuing legal education committee.

She is also involved with the Third Level Crisis Center Legal Aid Clinic.

Lindsay holds a bachelor's degree, *cum laude*, in political science from Albion College and a Juris Doctor, *cum laude*, from Michigan State University College of Law. Her previous experience includes working as a legislative intern for U.S. Representative Mike Rogers.

Lindsay works in the firm's Traverse City office and can be reached directly at 231-486-4547 or lweber@shrr.com.

Business Law News and Success

Dan Morley has been named chair of Smith Haughey Rice & Roegge's Business & Individual Planning Practice Group.

George Bearup recently gave a presentation to the Life Underwriters Association about the new estate and gift tax laws. He will also be presenting on the topic of "Drafting *In Terrorem* or Penalty Clauses in Wills and Trusts" at two upcoming Advanced Estate Planning Drafting seminars for the Institute of Continuing Legal Education. Finally, George has been selected to serve as secretary of the Munson Medical Center Board of Trustees for 2011 and 2012.

Dan Morley and **Steve Stawski** recently presented at the "Hot Topics in Construction Law" seminar, sponsored by Rehmann. Dan's presented on "Bankruptcy and Construction Law Issues" and Steve presented on "Protecting Rights to Payment."

Jon Siebers has closed real estate transactions totalling over \$20 million since May 1, 2010. The transaction included a mix of traditional bank-financed acquisitions and seller-financed acquisitions.

Steve Stawski has joined the Education Committees of both the Michigan Land Title Association and the Commercial Alliance of Realtors.

Rob Tubbs recently participated in filming a segment on the role of the planning commission chairperson for the Michigan State University Extension Service, which will be used for a continuing education series for planning commissioners in northwest lower Michigan. In addition, Rob has been elected to the Board of Directors of Child & Family Services of Northwest Michigan.

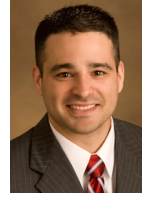
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